Lively Electric, Inc. *and* Eric D. Stimac. Case 14–CA–22433

February 24, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND TRUESDALE

On November 4, 1993, Administrative Law Judge James L. Rose issued the attached decision. The Respondent filed exceptions and a supporting brief.

National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

I. RELEVANT FACTUAL FINDINGS

Charging Party Eric Stimac was an employee of the Respondent whose record of driving-while-intoxicated citations required the Respondent to pay more than $1500 a year in excess insurance premiums (because Stimac was in a high risk driver pool) and to put up with certain inefficiencies because Stimac could not be insured to drive to worksites some of the specially equipped trucks that he and fellow employees operated at those sites.

The Respondent's sole owner, Tom Vonck, had discovered Stimac's driving problems only after hiring him as a residential wireman trainee, but Vonck agreed to keep Stimac on so long as it was understood that he would not be paid all the periodic wage rate increases called for under the applicable multiemployer collective-bargaining agreement. The judge, crediting Vonck and discrediting Stimac, found that Stimac accepted this arrangement. Thus, until the events that immediately gave rise to this case, amounts equivalent to what Vonck regarded as the excess costs Stimac's driving problems imposed on the Respondent were ''factored into his wage rate.'' As the judge found, ''the essence of [the agreement between Vonck and Stimac] was that Stimac would be paid substantially less than the contract rate in order to make up for the extra costs in having him covered by vehicle insurance.''[1]

Stimac eventually became dissatisfied with his pay and complained to the Union[2] about the discrepancy between his effective wage rate and the contract rate for residential wiremen, a classification for which he qualified under the collective-bargaining agreement by virtue of having worked for the Respondent for 2 years as a trainee wireman. The Union sent the Respondent a letter demanding compliance with the contract rate. Stimac's next paycheck reflected the contract rate with a deduction of $100 for insurance. When Stimac protested, Vonck essentially told him that he would continue to hold Stimac to their agreement and that if Stimac did not like that, he could seek other employment through the union hiring hall. Stimac angrily quit his job rather than accept the noncontractual reduction in his pay.

II. THE JUDGE'S DECISION AND THE RESPONDENT'S EXCEPTIONS

The judge found that the circumstances under which Stimac quit amounted to a constructive discharge in violation of Section 8(a)(3) and (1). In so finding, he relied on Board precedents holding that a constructive discharge may be found whenever an employee quits ''after being confronted with a choice between resignation or continued employment conditioned on the relinquishment of statutory rights.''[3] In this case, the judge reasoned, the statutory right which Stimac was forced to relinquish was his right to be paid according to applicable contract rates. The judge also found that Vonck's decision to settle on the particular $100-per-week figure for the insurance deduction after Stimac complained to the Union about his rate of pay ''reflected a specific unlawful motivation,'' i.e., displeasure at Stimac's having gone to the Union over the pay rate issue. The judge did not, however, expressly rely on another line of Board authority permitting a finding of constructive discharge whenever it is shown that an employer has imposed working conditions on an employee ''so difficult or unpleasant'' as to force him or her to resign and that it has done so because of that employee's union or other protected activities.[4]

The Respondent excepts, arguing that even assuming it might be guilty of a contractual breach, the circumstances surrounding Stimac's departure did not amount to a constructive discharge under either of the Board's two constructive discharge theories. For the following reasons we agree, and we therefore reverse the judge and dismiss the complaint.

[1] Vonck testified that he gave Stimac the choice between being paid the contract rate with an express deduction for the insurance or being paid lower wage rates. He regarded the latter option, which Stimac accepted, as having advantages for Stimac because the gross pay subject to taxation was lower than it would be if the correct pay rate were stated and a deduction then taken.

[2] Local 146, Electrical Workers (IBEW).

[3] *Control Services*, 303 NLRB 481, 485 (1991), enfd. mem. 975 F.2d 1551 (3d Cir. 1992).

[4] See, e.g., *Manufacturing Services*, 295 NLRB 254 (1989), and cases there cited. This is sometimes referred to as the ''*Crystal Princeton*'' line of authority, referring to *Crystal Princeton Refining Co.*, 222 NLRB 1068 (1976).

III. ANALYSIS

The complaint in this case—which was based on the unfair labor practice charge filed by employee Stimac—does not allege an unlawful midterm contract modification in violation of Section 8(a)(5) and (1), although the facts of the Respondent's pay practices regarding Stimac would probably have supported such a finding had an appropriate charge been filed. Rather, it alleges that the discharge of Stimac violated Section 8(a)(3) and (1), invoking a section of the Act which requires a showing of discrimination with a motive of encouraging or discouraging union membership.

In *Superior Sprinkler, Inc*., 227 NLRB 204 (1976), the Board explained the basis for supplying the discriminatory motive element in what might be called a ''Hobson's choice''[5] constructive discharge case—a case in which the theory is that the employee was unlawfully forced to a choice between losing his job and giving up statutory rights. The respondent employer in *Superior Sprinkler* had unlawfully terminated its relationship with the union and announced an intent to operate nonunion henceforth. The employees in question, all union members, quit their jobs rather than work under nonunion conditions. The Board found constructive discharges in violation of Section 8(a)(3) and (1), reasoning as follows (id. at 210 footnote omitted):

> Superior . . . offered its employees the choice of accepting the employer's unlawful repudiation of its statutory bargaining obligations and working under unlawfully imposed conditions of employment or quitting their employment. Thus, the employees' continued employment would be conditioned upon their abandonment of rights guaranteed them under the Act, that is, the right to bargain collectively through representatives of their own choosing. Forcing employees to make such a choice; namely, to work under illegally imposed conditions or to quit their employment ''discourages union membership almost as effectively as actual discharge.''

As the Fifth Circuit subsequently observed in *Electric Machinery Co. v. NLRB*, 653 F.2d 958, 965 (5th Cir. 1981), the Board in *Superior Sprinkler* was essentially relying on a discriminatory motivation theory derived from *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967), i.e., it had found that the employer's conduct was '''inherently destructive' of important employee rights,'' so that '''no [independent] proof of anti-union motivation'' would be required. *Electric Machinery*, supra at 965, quoting *Great Dane*. The court agreed that totally repudiating employees' collective-bargaining representative and forcing them to work in a nonunion shop would meet the ''inherently destructive'' test, but it did not agree that the conditions imposed on the employees in the case before it met that test. The employer in *Electric Machinery* had violated Section 8(a)(5) and (1) of the Act by imposing new terms and conditions of employment after postcontract-expiration bargaining but before impasse was reached and by dealing individually with the unit employees in trying to persuade them to accept the employer's final proposals. Not long after the commission of those violations, the employer signed a letter of assent making it a party to the new multiemployer agreement, and the dispute with the union over working conditions ended. The court upheld the findings of 8(a)(5) violations for unilateral changes and direct dealing; but it did not agree that any of the facts could support ''an inference of anti-union animus'' or that the employer's conduct was ''so egregious as to eliminate the General Counsel's burden of proving anti-union animus.'' It noted that the employer had taken ''no action which would permanently jeopardize future union status and, in fact three weeks after committing the unfair labor practices'' had rejoined the multiemployer association. Supra, 653 F.2d at 966.

Similar considerations foreclose a finding of inherently destructive conduct here. The failure to follow the contract in determining the level of Stimac's wage rates in no way signaled essential hostility to the bargaining relationship or to Stimac's sentiments concerning the Union. Indeed, according to undisputed testimony, Vonck himself was a longtime union member who was still paying dues to the Union; and the Union's business agent testified that to his knowledge the Respondent had always complied with the applicable collective-bargaining and trust fund agreements. To be sure, in some of our recent cases,[6] we have found constructive discharges in the absence of express total repudiation of the employees' bargaining representative; but we cautioned in one of those decisions that ''we were not suggesting that employees are privileged to quit their employment whenever there is alleged a mere breach of the collective-bargaining agreement.''[7] Those recent cases probably represent the outer limit for determining that unlawfully imposed conditions are so destructive of important Section 7 rights that no motivation element of Section 8(a)(3) is necessary. Given the circumstance prompting the employee's resignation in the present case—a unilateral modification of his pay rate related to his unique insurability problems—this case is clearly over the line.

There remains, of course, the judge's finding that Vonck acted in hostility to Stimac's act of going to the union business agent to seek vindication of his contractual rights. At first blush that might appear to allow us

[5] See *White-Evans Service Co*., 285 NLRB 81 (1987).

[6] E.g., *Control Services*, supra; *RCR Sportswear*, 312 NLRB 513 (1993).

[7] *RCR Sportswear*, supra, 312 NLRB at 514 fn. 7.

to fit this case into the *Crystal Princeton* line of authority. There is an impediment, however: the judge found no unlawful motive in the Respondent's original reduction of Stimac's wages to offset the excess insurance costs. Thus, the unlawful employment condition imposed on the basis of Stimac's union activities is simply the difference between the $100 deduction made from Stimac's paycheck after he went to the Union and the wage rate adjustments to which he had previously agreed. The evidence shows that during the weeks before Stimac went to the Union, he was being paid $9.83 an hour, although he was contractually entitled to $13.13 an hour. This represents a discrepancy of $3.30 an hour, or $132 for a 40-hour week. That, in turn, suggests that when Vonck made the $100 deduction from Stimac's paycheck, he was not imposing a condition ''so difficult and unpleasant'' as to force a reasonable person to quit. Rather, he was actually raising Stimac's pay by effectively decreasing the downward adjustment. This hardly meets the *Crystal Princeton* test.[8]

Finally, even apart from the logic of our precedents, it seems ill advised as a matter of policy to encourage employees to quit their jobs whenever they suffer *any* unlawful condition, at least if they have avenues for remedying that condition. In this case, Stimac could have filed a grievance over his pay and, if the Respondent refused to accede to the grievance, Stimac could have pursued it while he worked on the job.[9] He could also have filed a charge with the Board, if for any reason the contractual grievance-arbitration route were blocked. As noted at the outset, however, we have no complaint allegation targeting the March 1993 pay reduction as a separate violation, either as a discriminatorily motivated reduction in violation of Section 8(a)(3) or as a breach of the collective-bargaining agreement in violation of Section 8(a)(5). All we have is evidence of the breach, Stimac's angry resignation in response, and a complaint allegation of a discharge in violation of Section 8(a)(3) and (1). For the reasons stated above, the record here does not support finding such a violation.

ORDER

The complaint is dismissed.

CHAIRMAN GOULD, dissenting.

Contrary to my colleagues, I would affirm the judge's finding that the Respondent constructively discharged Charging Party Eric Stimac in violation of Section 8(a)(3) and (1) of the Act.

The Respondent hired Stimac in 1988 as a residential trainee wireman. Under the collective-bargaining agreement in effect, a trainee starts at 60 percent of the hourly pay received by a residential wireman. The agreement provides for a trainee's salary to increase 10 percent every 6 months until he qualifies as a wireman. However, the Respondent and Stimac had agreed that his hourly rate would be reduced by an unspecified amount to cover extra insurance costs related to his poor driving record. Consequently, the Respondent never raised Stimac's salary beyond that of 75 percent of the wireman rate until Stimac complained to the Union, Local 146, Electrical Workers (IBEW), in early March 1993. The Union then wrote to the Respondent requesting that it grant Stimac wireman status and pay him the appropriate wage rate of $13 per hour.

At the next pay period which ended March 10, the Respondent increased Stimac's pay to $13.13 per hour for 39.5 hours of work, which after taxes and other standard deductions would have left Stimac with a net pay of $408.19. The Respondent, however, deducted an additional $100 allegedly to cover the costs associated with Stimac's poor driving record.

When he noticed the $100 deduction, Stimac loudly complained to the Respondent's owner, Thomas Vonck, who responded that: ''I cannot afford to pay both. I can pay you what the union prescribes; but this is the arrangement and [if] you can agree to that, great. If you don't like that, you will have to exercise your option to go sign into the [union] hall and seek employment from them.'' Stimac then quit, returning at a later date to collect his last paycheck and a pink slip.

The judge found that Stimac had a statutory right to be paid in accordance with the collective-bargaining agreement. The judge also found that the Respondent had constructively discharged Stimac because he quit his job in reaction to the Respondent's ''Hobson's choice'' of resigning or continuing to work in deroga-

[8] Contrary to our dissenting colleague's assertion, this is not mere ''speculation'' on our part. The evidence of what Stimac had been paid, the applicable wage rate for his classification, and his agreement with Vonck to have his compensation reduced because of his insurability problems are all in the record and are not subject to factual dispute.

As for our colleague's observation that the judge ''declined'' to use a *Crystal Princeton* analysis, we find that immaterial. Under Board law, a constructive discharge predicated on an employee's act of quitting can be shown either under the ''Hobson's choice'' line of cases or the *Crystal Princeton* line. As argued above, in keeping with the admonition in *RCR Sportswear*, supra at 514 fn. 7, we would not find that the former line of precedent automatically applies whenever an employer has committed some unfair labor practice against an employee and the employee has decided to resign over it. As to the latter line, a mere showing of unlawful motivation on the part of the employer is not sufficient.

The unlawfully motivated action on the part of the employer must create an employment condition sufficiently ''difficult or unpleasant'' to cause a reasonable person to quit (see cases cited at fn. 4, supra). Because the facts here do not support a violation under any available theory of constructive discharge liability in Board law, we do not find the violation.

[9] The record indicates that Stimac filed a grievance, but it was over what he had claimed was his discharge, not over the wage rate issue; and the Union's business agent testified that the Union had tried to take it to the contractual joint labor-management grievance adjustment panel, but had proceeded no further when that panel declined to hear it.

tion of the collective-bargaining agreement. The judge concluded that the proffer of such a choice constituted a constructive discharge in violation of Section 8(a)(3) and (1) of the Act, citing *Control Services*, 303 NLRB 481 (1991), and *RCR Sportswear, Inc*., 312 NLRB 513 (1993). The judge found that the Respondent was unable to explain how it arrived at the $100 figure it deducted from Stimac's paycheck and thus that the Respondent had a specific unlawful motivation, i.e., to retaliate against Stimac for having pressed through the Union his entitlement to the contractual rate.

Contrary to my colleagues, I would agree for the reasons stated by the judge that by its conduct the Respondent constructively discharged Stimac. My colleagues do not dispute the judge's finding that Stimac had a statutory right to receive the contractual wage rate or that the Respondent's conduct left Stimac with the choice of quitting or continuing to work in derogation of that statutory right. Rather, they base their dismissal of the complaint on his finding that the Respondent's conduct was not ''inherently destructive'' of Stimac's Section 7 rights and that the working conditions imposed on Stimac were not ''so difficult or unpleasant'' as to force him to quit.

I need not engage in a debate with my colleagues over the applicability of an ''inherently destructive'' analysis in constructive discharge cases. Such an analysis is clearly unwarranted in this case since the judge specifically found that the Respondent's conduct was motivated by Stimac's union activities. While my colleagues are correct that the judge found no unlawful motive in the Respondent's original reduction of Stimac's wages to offset the excess insurance costs, they ignore the fact that the judge found that the Respondent ''had a specific unlawful motivation in specifying the $100 per week condition.''[1] Similarly unwarranted in this case is my colleagues' discussion of an ''intolerable working conditions'' analysis. The judge specifically declined to utilize such an analysis, and the General Counsel filed no exceptions. I note, however, that my colleagues reach the conclusion that Stimac actually received a pay increase after he sought the Union's assistance, a theory never advanced by the Respondent and based on mere speculation on their part.

Finally, I note that although Stimac could have chosen to continue to work while pursuing a grievance or a charge with the Board, the Act does not require him to do so. The Respondent's conduct constituted a deliberately deceptive scheme to circumvent Stimac's statutory right to receive the contractual wage rate in retaliation for his having sought the Union's assistance, and in such circumstances the Act protects Stimac's right to refuse to tolerate such conduct.[2] Accordingly, I would find, in agreement with the judge, that the Respondent constructively discharged Stimac in violation of Section 8(a)(3) and (1) of the Act.

[1] In this regard, the judge found that Vonck was unable to defend the $100 figure ''except in the most general terms.''

[2] My colleagues' reliance on the fact that Vonck himself was a longtime union member who was still paying dues to the Union and that the Respondent had always complied with the applicable collective-bargaining and trust fund agreements is misplaced. These facts in no way detract from the judge's finding that the Respondent's conduct toward Stimac was motivated by unlawful union considerations.

Kathy J. Talbott-Schehl, Esq., for the General Counsel.
James P. Baker, Esq., of Springfield, Missouri, for the Respondent.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me on August 12, 1993, at Saint Louis, Missouri, on the General Counsel's complaint which alleged that on March 12, 1993, the Respondent discharged Eric D. Stimac, the Charging Party, in violation of Section 8(a)(3) of the National Labor Relations Act. The Respondent denied that it engaged in any activity violative of the Act.

Following the hearing, both counsel submitted briefs. On the record as a whole, including my observation of the witnesses, briefs, and arguments of counsel, I issue the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges that the Respondent, an electrical contractor doing business in Illinois, meets the Board's jurisdictional standard on an indirect outflow basis, in that during the 12-month period ending May 31, 1993, it performed services in excess of $50,000 for Christian County (Illinois) Mental Health Association which in turn meets the Board's jurisdictional standards. The Respondent denied jurisdiction in its answer, but at the hearing stipulated to these facts.

Accordingly, I find that the Respondent meets the Board's jurisdictional standards and is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

It is admitted, and I find, that Local Union 146, International Brotherhood of Electrical Workers, AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICE

A. *The Facts in Brief*

The Respondent is a corporation wholly owned by Thomas L. Vonck. He began working for the Respondent in 1975 and in 1988 bought the business from the original owner.

The Respondent has been a party to successive collective-bargaining agreements with the Union, and its electrician employees are members of the Union, as is Vonck.

Eric Stimac started with the Respondent as a residential trainee in early 1988. According to his testimony, he became a member of the Union in April 1989 though the Union's records indicate he was initiated in February 1990. Unexplained is how he avoided becoming a member after his 31st day of employment as was required by the collective-bargaining agreement. In any event, under that agreement, as a trainee he received 60 percent of the residential wireman's rate, and this was to increase by 10 percent a year until he became classified as a residential wireman.

However, for the pay period ending March 3, and those preceding, Stimac's hourly rate was $9.83, which has no apparent basis in the contract, being about 75 percent of $13. A third 6-month trainee is to receive 70 percent of the journeyman rate and a fourth 6-month trainee 80 percent. His gross pay for 39 hours that week was $383.37 and his net, after taxes and other deductions, was $311.50.

Sometime in early March 1993 Stimac went to the Union to complain that he was still a trainee and, he testified, he was told he should be upgraded. This meeting resulted in a letter from the Union's business manager to Vonck that Stimac should be made a residential wireman and be given the rate of $13 an hour.[1]

For the pay period ending March 10, Stimac's hourly rate was $13.13 (more than the Union's letter required) which for 39-1/2 hours resulted in gross pay of $518.63 and a net, after taxes and other standard deductions, of $408.19. However, from this pay Vonck also deducted $100 to cover the ''direct and indirect'' costs associated with the fact that Stimac's driving record was such that the Respondent had to have special vehicle insurance for him and he could drive only one of the Respondent's trucks. Thus his net that week was $308.19, which was less than the week before even though he had worked one-half hour more.

Stimac testified that he picked up this pay check at about 4:30 p.m. on Friday March 12, noted the hourly rate, and left believing he had received the indicated raise. A few minutes later he discovered the $100 deduction, and went back to confront Vonck.

According to Stimac, when he asked Vonck about the deduction, Vonck ''looked at me, and he said, you do not go round me to get a raise [which I do not credit]. I said, well, this isn't right. He said, that's the way it is going to be, if you don't like it, I have your last two days pay and your pink slip right here. He hand it to me and I throw everything back in his face and told him he could keep them, I should see him in court.''

Stimac testified that he returned Monday to get the last two paychecks and pink slip, which he needed in order to be referred to another job by the Union. Stimac admitted that he grabbed the pink slip from Vonck and added ''that I worked for a lot of assholes, but he was the biggest that I had worked for and as far as I am concerned, I hoped he would burn in hell.''

[1] Attached to the letter was an addendum to the contract giving the effective date for $13.13 as ''6/1/92.'' This appears to have been a typographical error and should read ''6/1/93.''

Vonck's version of the Friday and Monday events, which I credit, is in any event substantially the same as Stimac's, except when Stimac returned Friday yelling about how unfair the deduction was, Vonck ''just told him, I am sorry, I cannot afford to pay both. I can pay you what the union prescribes, but this is the arrangement and you can agree to that, great. If you don't like that, you will have to exercise your option to go sign into the hall and seek employment from them.''

The arrangement to which Vonck referred was the fact that he had to pay extra to insure Stimac, in addition to which there were costs involved because Stimac could only drive one truck. Vonck testified that early on in Stimac's employment they reached an agreement whereby Stimac's hourly rate would be reduced to accommodate what Vonck calculated to be costs of about $100 per week.

Stimac admitted that he had a poor driving record, which included a second driving while intoxicated shortly after starting to work for the Respondent. And he admitted that Vonck told him that insurance for him would be extra, however, he denied he ever agreed to be paid less than the contract rate in return for Vonck buying insurance for him.

B. *Analysis and Concluding Findings*

The General Counsel argues that Stimac was discharged, or alternatively, if he quit it was a constructive discharge because he had exercised his rights under the collective-bargaining agreement. In either event, his termination was violative of Section 8(a)(3).

The Respondent contends that Stimac quit his job and that Vonck did not change any condition of Stimac's employment in an adverse manner, nor did he retaliate because Stimac had gone to the Union in order to get an increased wage rate.

There can be little doubt that Stimac quit his job and was not discharged. Thus the issue is whether he was constructively discharged when Vonck said that he would either have to accept the $100 deduction each week, if he wanted the $13.13-per-hour rate, or he could go to the Union and find another job. I conclude it was.

While there are unanswered questions in this record, the overwhelming evidence is that Stimac and Vonck made a private agreement the essence of which was that Stimac would be paid substantially less than the contract rate in order to make up for the extra costs in having him covered by vehicle insurance.

Vonck did not know of Stimac's driving record when Stimac was hired. However he shortly learned that the insurance carrier would require Stimac to be covered on some kind of an additional risk basis. Vonck understood that if Stimac had no further problems, it would only last 6 months but he advised Stimac that until he could get Stimac on the regular policy, he would not be able to pay Stimac the full contract rate.

Shortly thereafter, however, Stimac had a second citation for driving while intoxicated, and Vonck learned that the additional cost of having Stimac on the policy would last 5 years. Vonck told Stimac that if he wanted to continue to work, his rate would have to be reduced to cover the additional cost of insurance. According to Vonck, whom I credit on this point, Stimac agreed; however, I do not believe that they ever agreed to a specific amount to be deducted from the rate to which Stimac would otherwise be entitled. I con-

clude that Vonck made unilateral determinations of how much he would pay Stimac whenever the collective-bargaining agreement provided for a wage increase.

Stimac denied that he to agreed be paid less than the contract rate in order to be covered under Vonck's policy, or that Vonck even told him why he would not pay Stimac the rate to which he was entitled. However, Stimac did admit that in the affidavit he gave a Board agent he said, ''I had gone to owner Tom Vonck about the wages, but he would say—he kept bringing up that he had to pay higher insurance on my driving.''

I do not credit Stimac. Rather, I find that he agreed to accept less than the contract rate, or at a minimum, did not protest Vonck's decision to pay him less because of the added cost of vehicle insurance. In discrediting Stimac I found his demeanor to be less than candid, especially when attempting to explain the discrepancy between his investigatory affidavit and his testimony on the matter of whether he had agreed to accept less than the contract to make up for the cost of insurance. Further, in the summer of 1992 Stimac asked for, and received, a 1-week unpaid vacation, during which he applied for unemployment compensation. Such a duplicitous act regarding his employment negatively affects my confidence in his credibility.

The undisputed evidence suggests that the Respondent's compliance with the collective-bargaining agreement was at best lax. Thus, for instance, Stimac was not required to join the Union on completing 31 days' employment. He was not given the periodic raises required. Nevertheless, Stimac had a statutory right to be paid in accordance with the contract, and his failure to protest Vonck's decision to pay him less because of the cost of the insurance could not negate this right. E.g., *Beckley Belt Service*, 279 NLRB 512 (1980).

Thus I conclude that when Stimac quit his job he did so because Vonck gave him the choice of continuing to work in derogation of the collective-bargaining agreement or resigning. The Respondent therefore violated Section 8(a)(3) and (1) of the Act. *RCR Sportswear*, 312 NLRB 513 (1993).

In arguing against a finding of constructive discharge, counsel for the Respondent relies on *Algreco Sportswear Co.*, 271 NLRB 499 (1984), and others, wherein the Board has held that to prove a constructive discharge the General Counsel must show that the conditions of employment are so intolerable as to force the employee to resign. And, as in *Algreco*, supra, not even a serious unfair labor practice necessarily amounts to an intolerable condition.

However the intolerable condition theory differs from ''the theory of constructive discharge applicable to employees who quit after being confronted with a choice between resignation or continued employment conditioned on relinquishment of statutory rights.'' *Control Services*, 303 NLRB 481, 485 (1991).

Even if there had been an agreed to amount to cover the insurance costs, or if Vonck could have given those costs in a definitive way, Stimac still had the statutory right have the collective-bargaining agreement apply without change.

Finally, it is obvious that the $100-per-week figure was arrived at by Vonck in retaliation for Stimac having pressed through the Union his entitlement to the contract rate. Vonck was unable to defend the $100 figure except in the most general terms, and even then could not come up direct and indirect costs approaching $5200 per year. Thus, I conclude Vonck had a specific unlawful motivation in specifying the $100-per-week condition.

REMEDY

Having concluded that the Respondent has engaged in an unfair labor practice, I shall recommend that it cease and desist therefrom and take certain affirmative action, including offering Eric D. Stimac immediate reinstatement to his former position of employment without any loss of benefits or other rights and privileges and make him whole for any losses he may have suffered as a result of the discrimination against him in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]